



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-96-3\*

### FACTS:

You are a full-time supervisor in an on-going protective service unit within the Department of Social Services (“DSS”). You have served as a DSS employee since 1978. In addition to the foregoing, you are also employed on a part-time basis (20 hours per week) as a Safe Home Coordinator and Counselor by Adult/Adolescence Counseling, Inc. (“AAC”) in its domestic violence program known as “Services Against Family Violence” (“Services”). You applied for this position in response to a job advertisement in the *Boston Globe*.

As part of its Services program, AAC operates a Safe Home Network (“SHN”) which provides a safe place/shelter to women and children seeking to escape domestic violence. Utilizing donated space in hotels/motels or personal homes, individuals or families seeking shelter contact a 24-hour hotline through which they are directed to a safe home location. Such locations are not publicized and change periodically for security purposes. The SHN model is currently a popular adjunct to many battered women’s programs and provides the shelter function for most such programs. You state that the SHN model is less costly than a single site shelter. Moreover, the SHN model provides greater security than a single site shelter because it is difficult for a batterer to track a domestic violence victim where the safe home locations are not publicly disclosed and such locations change periodically. The SHN as well as the other domestic violence services offered by AAC are available free of charge on a 24-hour per day basis.

The Services program is funded by various resources including a contract with the DSS, community development block grants from several area communities, corporate and foundation grants and individual contributions. The DSS contract, which, among other things, requires AAC to provide a domestic violence safe home, constitutes approximately 81% of the total revenues for the Services program.

With regard to your particular responsibilities at AAC, you are involved in recruiting homes and/or hotels/motels for use as SHN locations. You also participate in the training of volunteers who provide services through the SHN program. You provide coverage for the 24-hour hotline service and counseling services to SHN clients when you work all night/on call shifts. You do not participate in the financial management of the SHN. AAC’s contract with the DSS contemplates the particular services with which you are involved as an AAC employee (the 24-hour hotline, individual and group counseling, and safe home services).

### QUESTION:

In light of your DSS employment, does the conflict of interest law allow you to retain the above described part-time employment arrangement?

### ANSWER:

Yes, provided that you comply with certain conditions.

### DISCUSSION:

In your DSS position, you are a state employee<sup>1/</sup> for purposes of the conflict of interest law.

Section 7 of G.L. c. 268A prohibits a state employee from having a direct or indirect financial interest in a

contract made by a state agency unless an exemption applies. We have previously found that the §7 prohibition is relevant to a state employee who is additionally employed by a private organization which has a contract with a state agency to perform certain services. In particular, where a state employee works for a state agency vendor to provide services under a state contract, we have held that the state employee has an indirect financial interest in the private employer's state contract. See *EC-COI-81-141*; 85-81. In your case, where the tasks which you perform in your private capacity are contemplated under AAC's funding arrangement with DSS, we find that you have an indirect financial interest in the contract between AAC and DSS.

The last paragraph of §7, commonly known as the "critical need" exemption, provides that:

[t]his section shall not prohibit a state employee from being employed on a part-time basis by a facility operated or designed for the care of mentally ill or mentally retarded persons, public health, correctional facility or any other facility principally funded by the state which provides similar services and which operates on an uninterrupted and continuous basis; provided that such employee does not participate in or have official responsibility for, the financial management of such facility, that he is compensated for such part-time employment for not more than four hours in any day in which he is otherwise compensated by the commonwealth, and at a rate which does not exceed that of a state employee classified in step one of job group XX of the general salary schedule contained in section forty-six of chapter thirty, and that the head of the facility makes and files with the state ethics commission a written certification that there is a critical need for the services of the employee. Such employee may be compensated for such services, notwithstanding the provisions of section twenty-one of chapter thirty.

We have previously applied this exemption to group residence homes operated by private vendors of the Commonwealth where the major funding source for the group home is a state agency, where the services provided are similar to those provided by similar state facilities and where the program operates on a twenty-four hour per day basis. See *EC-COI-83-71*. In contrast, we refused to apply the exemption in a situation involving periodic daytime respite care services because we found that services provided only during the daytime on an "as needed basis" or under a regularly scheduled basis of four hours per week were not sufficiently continuous to meet the requirement of the exemption. As we have previously concluded "[i]n order to qualify for the exemption, employees must be working, at a minimum, in a program which provides round-the-clock services." *EC-COI-83-73*.

In order to determine the applicability of the exemption to the case at hand, we must decide whether the SHN is a facility within the meaning of the final paragraph of G.L. c. 268A, §7. We note that the Legislature did not provide a definition for the word "facility" as used in the critical need exemption. We therefore look to other sources including the legislative history of the critical need exemption. We are guided by the following premise of statutory construction:

[The] intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objective which the law seeks to fulfill. Wherever possible, we give meaning to each word in the legislation; no word in a statute should be considered superfluous.

*Int'l Organization of Masters, etc. v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984) (citations omitted); *O'Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984).

The word "facility" ("facilities" plural) as defined in *Webster's Third New International Dictionary* (1961) means: ". . . 5 a: something that promotes the ease of any action, operation, transaction, or course of conduct . . . b: something (as a hospital, machinery, plumbing) that is built, constructed, installed, or established to perform some particular function or to serve or facilitate some particular end." As one court concluded, after noting a dictionary definition and looking at relevant case law, "the word facility is a very broad term and is intended to embrace anything, including human agencies which aid or make easier the performance of activities." *Extendicare, Inc. v. State Coordinating Council for Health Planning*, 532 P.2d 1119, 1122 (1975). Where courts, in seeking to define the word facility, have been forced to look to broad dictionary definitions and have recognized the ambiguous nature of the term, we find no generally accepted common law meaning upon which we may rely in examining the facts before us.

We therefore turn to the legislative history and purpose underlying the critical need exemption. See generally, *Commonwealth v. Collett*, 387 Mass. 424, 433 (1982) (“when phraseology of statute is ambiguous, court may look to various steps in its enactment to resolve ambiguity”). Prior to 1983, the Ethics Commission consistently advised full-time state employees that §7 prohibited them from being additionally employed by human services providers<sup>2/</sup> pursuant to contracts with the state agencies by which they were employed. See *State Ethics Commission Compliance Letter 81-21* (July 29, 1981); *EC-COI-81-141, Attorney General Conflict Opinion No. 798*. In late 1981, the Commission proposed a bill, H. 1235 (1982), which made various amendments to G.L. c. 268A. Among those amendments was a new exemption to allow state employees to work part-time in certain human service facilities, subject to a series of restrictions. In 1982, the Legislature considered H. 1235, and the critical need amendment. With certain minor changes, the Commission’s original proposal<sup>3/</sup> was later enacted (St. 1982, c. 612, §7, effective March 29, 1983).<sup>4/</sup> As we have previously recognized, in amending §7, it was the intent of the Legislature “to create an exemption which would permit state employees to work in twenty-four hour human service programs which customarily have difficulty obtaining sufficient staffing.”<sup>5/</sup> *EC-COI-83-73*.

As for the SHN, with regard to which you serve as a coordinator and counselor, we acknowledge that AAC does not operate its own shelter facility through which domestic violence services are provided. However, there appear to be sound reasons, namely cost and security, for providing domestic violence services through a network of locations rather than a single, permanent AAC operated facility. In order to find a facility within the meaning of the critical need exemption, we will not therefore require that providers of social service programs, which would otherwise meet the requirements of the critical need exemption, provide services at a particular fixed location.

We conclude that your part-time employment fits within the range of situations about which the Legislature was concerned when adding the 1982 exemption.<sup>6/</sup> Where the SHN, in effect, is the functional equivalent of a facility which is principally funded by the state and the SHN offers services similar to those which would otherwise be provided by the DSS itself,<sup>7/</sup> we find that you are employed in a facility which is covered by the critical need exemption. Moreover, where through the SHN, AAC provides domestic violence services on an around-the-clock basis, we find that the exemption’s requirement of uninterrupted and continuous operation is met.<sup>8/</sup> We believe that in applying the exemption to your situation where, for good reason, AAC chooses not to operate its domestic violence safe home out of a fixed facility, we are giving G.L. c. 268A, §7 a workable meaning which is consistent with the statutory language, the legislative intent and our prior opinions interpreting the exemption.

Accordingly, we find that you will meet the initial criteria of the critical need exemption. We note that you do not participate in or have official responsibility for the financial management of the SHN.<sup>9/</sup> Therefore, assuming that you comply with the other exemption criteria,<sup>10/</sup> you may continue your part-time employment arrangement without violating §7.

**DATE AUTHORIZED:** April 29, 1996

\* Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

<sup>1/</sup> “State employee,” a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (o) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group for the commonwealth. Such contractor or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof. G.L. c. 268A, §1(q).

<sup>2/</sup> These providers included both state facilities and private organizations providing services under contract with the Commonwealth.

<sup>3/</sup> As originally drafted the Commission’s proposed exemption was limited to state facilities providing services 24 hours per day, 7 days per week. Through a proposal from the House floor on July 1, 1982, Representative Cerasoli successfully amended the exemption to include within the class of eligible institutions any facility principally funded by the state which provides services similar to those provided by (state) mental health care, public health and correctional facilities and which operates on an uninterrupted and continuous basis. Under the amended language, it appears that the House sought to expand the exemption’s coverage to include private providers of social services which were principally funded by the state and which operated on a 24-hour per day basis.

<sup>4/</sup> The Commission conveyed to the Senate its support for House 1235 as amended through the efforts of Representative Cerasoli. See *Memorandum to Members of the Massachusetts Senate from Maureen McGee, Executive Director of the State Ethics Commission*, dated July 8, 1982.

<sup>5/</sup> This legislative intent may be discerned from the Commission's stated purpose in proposing the exemption:

Because it appears to be difficult for such institutions to hire sufficient staff to provide continuous coverage, and because individuals who are already state employees are often among those most qualified and willing to work in state institutions, it seems appropriate to allow state employees to accept such positions as long as certain safeguards are met. *An Act Amending The Laws Regulating the Conduct of Employees: Overview of Major Recommendations*, Publication of the State Ethics Commission, (undated).

<sup>6/</sup> This conclusion is supported by the House floor amendment to the original Commission proposal whereby the scope of the exemption was expanded to cover a wider range of social service facilities.

<sup>7/</sup> We find that the services provided through the SHN are intended to address the public health issues surrounding the problem of domestic violence. Moreover, such services are statutorily mandated by G.L. c. 18B, §2(A)(14) which requires the DSS to provide "temporary residential programs providing counseling and supportive assistance for women in transition and their children who because of domestic violence, homelessness, or other situations require temporary shelter and assistance." See 110 CMR 7.091:(3) ("Services to women in transition shall be provided by agencies or individuals under contract to the Department. Shelters shall be located in facilities that provide a safe, temporary residence in an anonymous location and shall be accessible on a 24-hour-a-day, seven-day-a-week basis.").

<sup>8/</sup> This application of the exemption is based on the fact that you work in relation to the SHN which operates on a 24 hour per day basis. Were you to work in other AAC programs which provide services on a limited, daytime basis, the critical need exemption would not be applicable. See *EC-COI-83-73* (pursuant to critical need exemption, the fact that provider runs certain programs on an around-the-clock basis does not afford state employee the opportunity to work after hours in all programs of that provider).

<sup>9/</sup> This is the case in both your DSS position and with regard to your work with AAC.

<sup>10/</sup> The other requirements of the exemption are:

1. You may not be compensated in your AAC position for more than four hours in any day in which you are otherwise compensated by the Commonwealth;
2. You may not be compensated at a rate which exceeds that of a state employee classified in step one of job group XX of the general salary schedule contained in section forty-six of chapter thirty; and
3. The head of the Services program must make and file with the Ethics Commission a written certification that there is a critical need for your services.